

Claimant alleges that in February 2006, while helping move the male wheelchair patient, John Wolfe, she injured her left shoulder. Claimant described the incident as

involving moving Mr. Wolfe from the chair to his bed. While doing this, claimant felt a pop and suffered pain in her shoulder and upper back. The lifting was accomplished with the aid of co-worker Gloria Delgado. Claimant said she was supporting Mr. Wolfe's upper body while Ms. Delgado supported his legs. It was during this process that claimant alleges the injury occurred. Claimant testified that she reported the incident to her supervisor, John Anton, on the date of accident. Claimant then reported the incident to Mr. Anton's supervisor, Carol DeLeon (respondent's assistant administrator). No medical treatment was offered.

Claimant went to her own family doctor, Pamela E. Stewart, M.D., at the Plaza Medical Center on March 7, 2006. Dr. Stewart's report of that date indicates left side, mid back pain from moving big people at work. Claimant's pain was in the mid-thoracic and mid-lumbar areas. A musculoskeletal sprain was diagnosed in the left back. Dr. Stewart limited claimant to a maximum of 10 pounds lifting. When claimant took these restrictions to respondent, she was told they did not have light duty.

Claimant was again examined by Dr. Stewart on March 14, with the note relating to that visit indicating that there is no light duty with respondent. The report for the next examination, on March 22, 2006, indicates left shoulder pain. Claimant was referred for an MRI of the shoulder. The MRI displayed impingement due to spurring and a small rotator cuff tear. Claimant was referred to orthopedic surgeon Guillermo E. Garcia, M.D., in Dodge City, Kansas. Medical reports of Dr. Garcia indicate a work-related injury on January 25, 2006, while lifting a heavy client. Claimant underwent surgery with Dr. Garcia to repair the rotator cuff on May 19, 2006.

Respondent denies the accident described by claimant. Claimant's co-worker, Gloria Delgado, testified that the incident described by claimant as allegedly occurring when lifting the patient, Mr. Wolfe, never occurred. Ms. Delgado denied that claimant ever told her that she hurt her shoulder. Ms. Delgado did say that claimant told her of a work-related injury to her back, but Ms. Delgado was not involved in the alleged injury. Ms. Delgado did testify that claimant had preexisting back problems and that claimant would ask others to do her lifting due to this back pain. Ms. Delgado also testified that claimant contacted her several times to get Ms. Delgado to testify that claimant was hurt at work. But Ms. Delgado did not remember any work-related accident suffered by claimant. Ms. Delgado said there were lifts available to assist when moving Mr. Wolfe, and that she never saw claimant try to lift him without the lift. Claimant testified that the lifts were not available on the day of her injury.

The E-1 Application For Hearing filed in this matter alleges a date of accident of January 25, 2006, through February 8, 2006. At the preliminary hearing, claimant amended her accident date to February 25, 2006.¹

¹ P.H. Trans., at 12.

Respondent's assistant administrator, Carol DeLeon, testified that claimant came to her either around the end of January or in February and reported a work-related injury to claimant's back while lifting a patient. According to claimant, the contact she had with Ms. DeLeon occurred a week or so after the alleged date of accident.² Ms. DeLeon's testimony was consistent with that, as Ms. DeLeon testified that the first contact she had with claimant was about two weeks after the alleged date of accident.³ Claimant also furnished her with Dr. Stewart's March 7, 2006 report, with claimant indicating to Ms. DeLeon a back injury. It was not until about one month later that claimant reported shoulder involvement.⁴ Ms. DeLeon did agree that claimant said she told Mr. Anton of the accident before claimant told Ms. DeLeon.

Respondent maintained a logbook, which contained entries regarding the care of patients at the three houses. Claimant testified that she placed an entry into the logbook on the date of accident regarding the injury. A portion of the logbook covering the dates from February 15, 2006, through the end of February was placed into evidence at the deposition of Ms. DeLeon. No mention of a work-related injury involving claimant was in the logbook. Logbook entries for the time before February 15, 2006, were not placed into the record.

Claimant testified that her last day with respondent was February 8, 2006. However, the work calendar identified by Ms. DeLeon showed claimant's last day was February 23, 2006.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.⁵

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁶

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

² Disc. Depo of Claimant at 38, 49 & 41; and P.H. Trans. at 11.

³ DeLeon Depo. at 11.

⁴ DeLeon Depo. at 13.

⁵ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

⁶ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁷

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

K.S.A. 44-520 requires notice of “accident” be provided. It makes no mention of notice of a specific injury. Here, respondent contends claimant did not notify it of the accident, but Ms. DeLeon, respondent’s assistant administrator, acknowledged that claimant told her of the accident, and claimant said the accident occurred two weeks before their conversation. Ms. DeLeon also said that claimant told Mr. Anton, claimant’s supervisor, before the conversation with Ms. DeLeon. Mr. Anton did not testify in this matter. From this record, this Board Member determines that claimant did notify respondent of the accident. Respondent also argues that claimant failed to provide notice of the shoulder injury. As noted above, notice of accident is all that is required under the statute. This Board Member finds claimant has satisfied the requirements of K.S.A. 44-520.

Respondent also argues that claimant failed to prove that she suffered accidental injury arising out of and in the course of her employment. The medical chart notes of Dr. Stewart indicate that claimant was injured while moving fairly large people at work. The preliminary determination on this issue hinges to a great deal on the credibility of the witnesses. The Board has, in the past, given some deference to an administrative law judge’s ability to assess credibility after witnessing live testimony. The testimony of claimant and Ms. Delgado are in direct conflict. The ALJ, after observing the claimant testify, found that conflict in claimant’s favor. This Board Member agrees with that finding and affirms the order for benefits.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to appeals of final orders which are determined by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order For Compensation of Administrative Law Judge Pamela J. Fuller dated August 22, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁸ K.S.A. 44-534a.

Dated this ____ day of October, 2006.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge